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# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 52.

WILLIAM J. DEMOREST JR., ANN DEMOREST and CAROLYN  
DEMOREST by GERALD P. CULKIN, their Special Guardian,  
Appellants,

v.

CITY BANK FARMERS TRUST COMPANY, as Trustee under  
the Will of HENRY C. WEST, Deceased, et al.

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## BRIEF FOR RESPONDENT EMMA M. WEST

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## BRIEF FOR RESPONDENT EMMA M. WEST

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### Reference to Official Reports of Opinions

The opinion of the Surrogate's Court is reported in 175 Misc. 1044. The majority opinion of the Court of Appeals is reported in 289 N. Y. 423.

The dissenting opinions of the Court of Appeals are reported in 289 N. Y. 432 *et seq.*

### Jurisdiction

The appeal is taken on behalf of infant remaindermen of a trust, by their Special Guardian, from an order of the Court of Appeals of the State of New York, dated January 15, 1943, and filed on remittitur in the office of the Clerk of the Surrogate's Court, County of New York, on January 25, 1943, which affirmed an order

of the Appellate Division of the New York Supreme Court, First Department, which had affirmed a decree of the Surrogate's Court, County of New York, judicially settling the intermediate account of proceedings of City Bank Farmers Trust Company, as Trustee under the will of Henry C. West, deceased, and directing, among other things, the distribution of the income received from certain parcels of real estate acquired by the accounting Trustee on foreclosure of mortgages, in accordance with the provisions of subdivision 2 of Section 17c of the Personal Property Law of the State of New York.

Emma M. West, the widow of testator, is respondent on this appeal and maintains the constitutionality of said statute.

### **Question Presented**

The appellants contend that this statute violates the Fourteenth Amendment of the Constitution of the United States of America "because it is retroactive and deprives appellants of property without due process of law and deprives appellants of rights guaranteed to them by said Fourteenth Amendment" (Appellant's brief, p. 2).

### **Statute Involved**

The statute involved in the appeal is Section 17-c of the New York Personal Property Law, being Chapter 452 of the Laws of New York of 1940, effective April 13, 1940, and is set forth in the appendix to this brief.

### **Statement of Case**

The testator, died on May 1, 1934. His will bearing date December 14, 1928 was admitted to probate by decree of the Surrogate's Court of the County of New York on May 28, 1934 (Record, p. 26).

By the fifth clause of the will, testator directed the Trustee to hold the residuary estate in trust, and

“to apply the net income from said estate to the use of my wife, Emma M. West, during the term of her natural life, or until she shall remarry”.

Other provisions of the will reflect the intention of the testator that the life beneficiary shall receive the entire net income. Such are the directions that no sinking fund shall be set aside from the income of the securities to amortize premiums on securities, and that all extraordinary dividends or distributions, other than stock dividends, whether paid in bonds, cash or otherwise, shall be treated as income (Record, pp. 90, 91).

The testator appointed City Bank Farmers Trust Company as Executor and Trustee of said will. By decree dated August 10, 1936 the Executor's accounts were settled, and it was directed to pay to itself as Trustee the balance of the funds in its hands.

At the time of his death the testator was the owner of nine mortgages, payment of which was guaranteed by Bond & Mortgage Guarantee Company, now in liquidation. These mortgages were in each instance secured upon parcels of real estate located in the City of New York. After testator's death the real estate upon which the mortgages were secured was acquired by the Trustee either at sale upon foreclosure, or by deed in lieu of foreclosure.

The decree entered in the Surrogate's Court on the Executor's accounting adjudged and decreed that each of the properties so received “and transferred by said Executor to itself as Trustee under said decedent's will, be held in a separate account by the Trustee”, and that the questions of apportionment of the proceeds received upon the ultimate sale of the properties and the rights of the parties interested should be reserved for a future account-

ing and taken into consideration by the Court "in determining the proper apportionment of the proceeds of sale of said properties".

The Trustee, in obedience to the direction in the decree, has accounted for each of the properties in a separate schedule of the present account—Schedules Cb to Cj, both inclusive (Record, pp. 47-72).

In the case of two of the parcels, salvage has been completed by the resale of the properties acquired at foreclosure.

The account of the administration of each of the properties comprising the nine investments has been so kept by the Trustee as to identify the income earned by each parcel in each fiscal year. The account allots to the life tenant, in accordance with the provisions of Section 17-c of the Personal Property Law, the net operating income from the properties up to 3% per annum of the principal amount of the mortgages, derived from the mortgaged properties in those years in which it was earned. Section 17-c of the Personal Property Law, which became effective on April 13, 1940, affects retroactively the disposal of the principal and income from these mortgage investments. In so far as it purports to direct the apportionment to the life beneficiary of the trust of 3% of the net income derived from these investments—thereby superseding the so-called Chapal-Otis rule (*Matter of Chapal*, 269 N. Y. 464; *Matter of Otis*, 276 N. Y. 101)—it is claimed, on behalf of appellants, that it deprives them of property and of vested rights without due process of law, and is therefore repugnant to the Fourteenth Amendment of the Constitution of the United States (Specification of assigned error intended to be urged—brief of Special Guardian, p. 6).

## ARGUMENT

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### POINT I

**Article 2 of subdivision 17-c of the Personal Property Law of New York is a procedural and remedial statute which confirms to the life beneficiary of a trust the right to receive during salvage a fixed proportion of the net income from the operation of real estate acquired by the the trustee upon the foreclosure of a mortgage investment. It displaces *pro tanto*, the Chapal-Otis rule which authorized trustees to use such net income for the repayment of advances made from principal for the foreclosure costs, tax arrears, and other expenses incurred in the protection of the mortgage investment.**

A salvage operation, as the term is used herein, occurs when a mortgage in default is foreclosed and title to the real estate is acquired by the trustee. The real estate thus acquired is substituted for the mortgage in the hands of the trustee, and takes on its character of personality.

*Matter of Otis*, 276 N. Y. 101, 111-12;

*Löckman v. Reilly*, 95 N. Y. 64, 71.

The Courts have taken judicial notice of the collapse in real estate values which, during the years following the panic in 1929, required and still requires trustees, upon foreclosure of mortgage investments, to "buy in" the real estate at foreclosure sale for lack of other bidders.

*Matter of Flint*, 240 App. Div. 217, 226; affd.  
266 N. Y. 607;

*Matter of West*, 175 Misc. 1044, 1049.

In thus protecting such investments, trustees have been forced to use funds from the principal of the estate to pay the costs of acquisition, overdue taxes and the like.

Under the Chapal-Otis rule, trustees have used the net rentals of the acquired real estate as the source of reimbursement of the trust fund for the advances so made from principal, in violation of the rights of the life tenant. The correction of this injustice is one of the remedial purposes accomplished by the enactment of this new statute.

The case at bar furnishes a typical example of the unfortunate consequences resulting to life beneficiaries from the application of this rule. The testator provided that his widow should receive the net income from his residuary estate. His intention that she should receive it unimpaired is shown by the directions that there should be no amortization of premium on investments, and also that all extraordinary dividends be paid to her without diminution (Record, pp. 90-91). Yet the widow has received no income from the real estate acquired upon foreclosure of the mortgages held by her trustee, during the six years of administration shown by the account, although all of the nine salvaged properties, with a single exception, have been productive of net rentals in one or more of those years.

The Chapal-Otis rule, which the Guardian mistakenly claims to be a rule of property, under which vested interests have been acquired by his wards, is an outgrowth of the rules of equitable apportionment first expressed in the decisions in *Meldon v. Devlin* (1898), 31 App. Div. 146, affirmed 167 N. Y. 573, and *Matter of Marshall* (1904), 43 Misc. 238, and later in *Furniss v. Cruikshank* (1921), 230 N. Y. 495, 508-510, to govern the apportionment between life tenant and remaindermen of the proceeds of liquidation of real estate acquired by a trustee on foreclosure of a mortgage. These allowed the life beneficiary of a trust to

participate in the division of the proceeds received by a fiduciary upon the liquidation of an investment in unproductive real estate. The inequity of a denial to the life beneficiary of any benefit from such an investment was remedied by allowing him a participation in the proceeds of sale proportionate to the normal income which he would have received prior to liquidation had the real estate been productive. In neither of these cases, however, did the question arise of disposal of the rentals derived from the operation of the acquired real estate during a salvage operation.

In *Matter of Chapel*, 269 N. Y. 464, the Court of Appeals was first confronted with the question of the disposal of net rentals received by a trustee during salvage. The Court held that the proceeds of sale, upon completion of the salvage operation, should be used first to pay the expenses of the sale and the foreclosure costs, and next to reimburse the capital account for any advances of capital for carrying charges not theretofore reimbursed out of income from the property. *Matter of Chapel* was decided in 1936, and was shortly followed by the decision in *Matter of Otis*, 276 N. Y. 101, holding, at page 115, that until the original capital had been fully restored, the trustee had only a discretionary right to distribute income from the salvaged property to the life beneficiary.

Following that decision, at least one of the Surrogates held, in *Matter of Brainerd*, 169 Misc. 640, 642, that payment of income to a life beneficiary from property still held in an uncompleted salvage operation, is never permissible until the advances for salvage purposes have been fully repaid; "thereafter such payments may be made in the discretion of the trustee". As a result, trustees fearing a surcharge of their accounts, hesitated to make any payment of surplus income to life beneficiaries.

The Court may take judicial notice of the fact that accumulations of net rentals in large amounts received from

the operation of salvaged properties, are held by New York fiduciaries awaiting distribution to income beneficiaries when the disputed questions involved in this appeal have been determined. Opinion of Foley J. *Matter of West*, 175 Misc. 1044, at page 1049.

The purpose of the statute is expressed in the note of the Executive Committee of the Surrogates Association of the State of New York, printed as part of the statute. It was adopted to simplify the complicated Chapal-Otis rule, and to provide a fair and equitable apportionment of the proceeds of a salvage investment, which would protect the interests both of income beneficiaries and remaindermen.

## POINT II

**No right is given to the remaindermen either by common law or by statute, to share in the income of a trust fund, their sole right being to receive the principal of the fund upon the termination of the trust.**

**Net income derived from trust investments, after payment of carrying charges attributable to income, belongs to the life beneficiary.**

**Not only are the remaindermen of a trust not entitled to have income applied to the repayment of advances made from principal; any such use of income is contrary to the public policy of the State of New York, because it violates the statute which prohibits accumulations of income except for the benefit of an infant, during minority.**

(a)

In the dissenting opinion of Lewis, J., cited by the Guardian, it is maintained that "there had vested in the income beneficiary and the remaindermen respectively

prior to the effective date of Section 17-c, subdivision 2, a proprietary interest in each of the properties acquired by the Trustee" (Record, p. 125).

With great deference to the learned Judge, we submit that under New York law, title to the trust assets is vested in the trustee. The beneficiaries have merely a right to enforce the performance of the trust in accordance with the provisions of the trust instrument.

Section 100 of the Real Property Law provides:

"Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."

This section of the Real Property Law is extended to personalty by Section 11 of the Personal Property Law.

*Williams v. Thorn*, 70 N. Y. 270;

*Matter of Van Kleeck*, 95 Misc. 40, affirmed 177 App. Div. 917.

Thus the right of the life beneficiary is to receive, when collected by the trustee, the net income of the trust fund; the right of the remaindermen is to receive the corpus of the fund upon the termination of the trust by the death of the life tenant.

*Matter of Central Hanover Bank and Trust Co. [Mormand]*, 176 Misc. 183, affirmed 263 App. Div. 801, affirmed 288 N. Y. 608.

As the Court of Appeals held in the instant case, *Matter of West*, 289 N. Y. 423 at page 428:

"After the initiation of the salvage operation, as before, both the life tenant and the remaindermen could compel the trustee to administer the trust and

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to apportion to each his just share of the income and principal, *but not that of any particular asset of the trust.* (*Lockman v. Reilly*, 95 N. Y. 64, 71; *Bennett v. Garlock*, 79 N. Y. 302, 320.) (Emphasis supplied.)

## (b)

Not only have the remaindermen no right to the income from a trust investment, but diversion of income from a life beneficiary and its use to repay principal advances made to protect a trust investment and thereby, indirectly, to increase the principal of a trust fund, is offensive to the law of New York which prohibits the accumulation of income, except for the benefit of an infant during his minority.

This prohibition is contained in Section 16 of the Personal Property Law, Laws of 1897, Chapter 417, Section 4, which provides as follows:

“An accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid:

1. If directed to commence from the date of the instrument or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of such minority.

. . . . .

3. All other directions for the accumulation of the income of personal property are void.”

In *Hascall v. King*, 162 N. Y. 134, it was held that a direction in a will to use income to pay off mortgage obligations, thereby increasing the capital of the estate by decreasing the burden thereon, constituted an invalid accumulation.

See also *Thorn v. deBreteuil*, 179 N. Y. 64.

In *Matter of Rogers*, 22 App. Div. 428, affirmed 161 N. Y. 108, Cullen, C. J., writing for the Court, empha-

sized the strict line of demarcation between the respective rights of life beneficiary and remaindermen. He said at page 431:

"If from the will of the testator it is apparent that he intended that the life tenant should receive as income that which as a strict matter of law would be principal, undoubtedly that intent should govern, for the testator could give the life tenant the power to consume the whole principal. Such was the case of *The Matter of James* (146 N. Y. 78). But if the intent is in the opposite direction, that that which the law holds to be income shall be treated as principal and go to the remaindermen, it is in effect an accumulation and wholly void. Our laws forbid accumulation except for the benefit of infants in being during their minority. \* \* \*

But if a testator's intent is to make that principal which is income, in the case of a trust of the nature of the one before us, such intent is not in conformity with law, but in express contravention of it. Therefore, the right of the remaindermen in this fund must rest on the legal character which the law impresses on the fund, and not on any intent of the testator."

The Court added:

"Our laws forbid accumulation except for the benefit of infants in being during their minority. No principle of public policy declared by our statute law has been more firmly and rigidly upheld by the courts than this inhibition against accumulations."

In the Courts below the Guardian sought to maintain that his wards had a vested right in the continuation of the Chapal-Otis rule which protected it from legislative change.

Such an argument is answered in *Second Employers' Liability Cases*, 223 U. S. 1, in which, at page 50, this Court said:

"A person has no property, no vested interest, in any rule of the common law. That is only one of the

forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will \* \* \* of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' *Munn v. Illinois*, 94 U. S. 113, 134; *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284 294; *The Lottawanna*, 21 Wall 558, 577; *Western Union Telegraph Co. v. Commercial Milling Co.*, 218 U. S. 406, 417."

In *New York Central R. R. Co. v. White*, 243 U. S. 188, this Court said (p. 198):

"No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." (Citing numerous cases.)

In *Cooley on Constitutional Limitations*, 8th Edition, the learned author said, at page 749:

"First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another. Acts of the legislature, as has been well said by Mr. Justice Woodbury, cannot be regarded as opposed to fundamental axioms of legislation, 'unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee'."

### POINT III

The statute, as interpreted by the New York Court of Appeals, is "fair and reasonable and protects the interests of both income beneficiaries and remaindermen". By simplifying, according to its declared purpose, the rules of procedure in mortgage salvage operations, and laying the basis of apportionment, as between life beneficiaries and remaindermen of a trust, of the proceeds of salvage operations, it constitutes a valid enforcement of the economic policy of the State of New York.

The interpretation placed upon the statute by the highest New York court is conclusive upon the Federal Courts.

The fact that the statute operates retroactively to change the previously existing rule, by giving the life beneficiary of a trust the right to the payment of a reasonable share of the net income earned during the continuance of a salvage operation, and postponing repayment of principal advances until its final liquidation, does not deprive remaindermen of any property right without due process of law, within the meaning either of the Federal or State Constitutions.

(a)

The formula provided by Section 17-c merely gives the life beneficiary, in place of the right which he has always possessed, of requesting his trustee, in its discretion, to pay him the distributable income from the trust estate—the definite right to insist upon the limited exercise of that power by his trustee. In the words of the statute:

"The general rules of the apportionment of the proceeds of sale between life tenant and remaindermen are retained subject to the express modifications made herein."

The new statute removes the injustice which resulted from application of the Chapal-Otis rule authorizing the Trustee to apply the income of the life tenant first to the repayment of advances from principal. The life tenant will now receive the 3% of surplus income specified by the statute, without the obligation of recoupment, and only the excess may be used for the repayment of advances from principal. After repayment of these advances, the balance, if any, remaining is impounded to await ultimate apportionment of the proceeds of sale. The allotment to the life tenant of the initial 3% is to be taken into account and charged against the life tenant in the final apportionment of the proceeds of sale.

Appellants sought to maintain in the Courts below a fancied inequity, reiterated at pages 16-17 of the Guardian's brief, based on the contrast between a salvage operation settled by a decree made prior to the date of statutory enactment, April 13, 1940, and a salvage operation uncompleted by decree until after the date of the statute. In the case first assumed, it is asserted that the rights of principal and income would have been determined by the Chapal-Otis rule; in the second assumed case, the remaindermen would be relegated to the statutory formula for recognition of their rights. The answer is that unless the Chapal-Otis rule gives the remaindermen vested rights, they have no grievance resulting from its abrogation.

Moreover, the argument is based upon a misunderstanding of the law. The termination of the salvage operation is not effected by the entry of a decree upon the accounting of the fiduciary; it is effected by the resale by the fiduciary of the real estate acquired upon foreclosure. It was so held by the Surrogate in the case at bar—175 Misc. at page 1061, and on appeal by the life beneficiary from this part of the decree, the decision was upheld (Record, p. 122).

Elsewhere it is asserted that there might be validity to the statute if it provided first for an adjudication of the

intent of the testator, but that under the provisions of the statute there is a forced adjudication of such intent, which renders the statute unconstitutional (Guardian's brief, pp. 24-25).

This argument ignores the principle stated by Cullen, C. J., in *Matter of Rogers*, *supra*, quoted at page 11 of this brief, that the right of the remaindermen must rest on the legal character which the law impresses on the fund and not on any intent of the testator.

This statute does no more than to observe and enforce this distinction, and the argument is erroneous that the statute adjudicates the intent of a testator. No deprivation of due process results.

A further statement in Judge Lewis' dissenting opinion, which is the basis of the Guardian's argument at pages 10 to 12, must be challenged. It is suggested that Section 17-c, subdivision 2, accomplishes a mandatory transfer to the life tenant of property rights which had become vested in the remaindermen under a rule of property which antedated the enactment of the statute. It cannot well be argued that a rule of property was established by the Chapal-Otis rule, when the Court of Appeals has declared in interpretation of its own decision, in *Matter of Otis*, *supra*, at page 115:

"Perhaps it should be added that a general rule for such situations cannot be attained at a bound; that no rule can be final for all cases, and that any rule must in the end be shaped by considerations of business policy."

And it later declared in *Matter of West*, *supra*, at page 431:

"As already noted, the rules of administration heretofore set forth were tentatively stated and expressly recognized as subject to change. Before a judicial declaration, thus tentatively stated, becomes a rule of property, it must have become permanently fixed and long continued."

It is obvious that no vested rights can be founded upon any rule which is contrary to the public policy of the State.

In *Nebbia v. New York*, 291 U. S. 502, this Court said at page 537:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*."

In *Chicago, B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549, at page 569, the Court said:

"The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*."

The Court cited the following statement from the opinion in *McLean v. Arkansas*, 211 U. S. 547, 548:

"The legislature, being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power." (Cases cited.)

## (b)

The interpretation of the statute by the New York Court of Appeals is binding upon the Federal Courts. It was held in *West v. A. T. & T. Co.*, 311 U. S. 223, 236, that the pronouncement of a State Court "is to be accepted by federal courts as defining state law".

As was said by Mr. Justice Brandeis in *Eric R. R. v. Tompkins*, 304 U. S. 64, 78:

"Except in matters governed by the Federal Constitution or by acts of Congress the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of federal concern."

In *Morley v. Lake Shore Ry. Co.*, 146 U. S. 162, 166, 167, this Court said:

"The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *Leffingwell v. Warren*, 2 Black 599, 603. The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court. *Randall v. Brigham*, 7 Wall 523, 541. \* \* \* our only inquiry must be as to the validity of the statute itself, as construed by the State Court."

## (c)

There remains to be considered the question whether, as insisted by the Guardian, the retrospective operation of the statute renders it unconstitutional.

On this point the decision of this Court in *Kuehner v. Irving Trust Co.*, 209 U. S. 445 seems particularly apposite.

In that case subsection (b) of Section 77B of the Bankruptcy Act was attacked on such ground. The act limited

the claim of a lessor for indemnity under a covenant in a lease to a sum not exceeding the rent received under the lease for a three year period. The lessor had in 1926 leased certain real estate to its lessee for a term expiring in 1946. In 1932 the lessee was adjudicated a voluntary bankrupt. The Trustee in bankruptcy of the lessee rejected the lease and abandoned the premises. The lessor re-entered and terminated the leasehold in accordance with the provisions of the lease, which contained a covenant by the lessee to indemnify the lessor against all loss of rent from such termination. The Trustee thereupon relet the premises to a new lessee for a lesser rental. In 1934, immediately after Section 77 B had become a law, the bankrupt lessee filed a petition for reorganization under the new statute, which was approved by the Court. The claim of the lessor for damages measured by the difference between the rent reserved upon the reletting, and the rent reserved under the lease for the remainder of the term, was disallowed, except to the extent of an amount equal to the rental for three years. In certiorari proceedings the lessor claimed that it had been deprived of its property without due process of law. This Court rejected the contention, stating at page 452:

"While, therefore, the Fifth Amendment forbids the destruction of a contract, it does not prohibit bankruptcy legislation affecting the creditors' remedy for its enforcement against the debtors' assets or the measure of the creditor's participation therein, if the statutory provisions are consonant with a fair, reasonable and equitable distribution of those assets. . . . The question is whether the remedy is circumscribed in so unreasonable and arbitrary a way as to deny due process."

And later in its opinion, the Court, commenting upon its decision in *City Bank Farmers Trust Co. v. Irving Trust Co.*, 299 U. S. 433, said:

"In framing the reorganization statute Congress obviously attempted to award landlords an equitable

share in the debtor's assets as in justice it was bound to do, since the purpose was to discharge the debtor from liability to future suits based upon the lease. It is incorrect to say that Congress took away all remedy under the lease. On the contrary, it gave a new and more certain remedy for a limited amount in lieu of an old remedy inefficient and uncertain in its result. This is certainly not the taking of the landlord's property without due process."

In *People ex rel. Eitel v. Lindheimer*, 371 Ill. 367, 21 N. E. (2) 318—appeal dismissed 308 U. S. 505—the Supreme Court of Illinois held that appellees had no vested rights under a statute which gave them an action to recover excess taxes paid through mistake or overassessment, and that a subsequent repealing statute, even though it was enacted after the commencement of an action under the old statute, and operated retrospectively to terminate appellees' right to proceed under the old statute, was not unconstitutional. Answering the argument of unconstitutionality, the Illinois Court said at page 321:

"A retrospective statute affecting vested rights is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void; but this doctrine is not understood to apply to remedial statutes of a retrospective nature not impairing contracts or disturbing absolute vested rights. . . ."

Appellees argue that the repealing statute is of doubtful constitutionality, but since we have held that no vested rights are involved, it is not necessary to consider that question."

The constitutionality of Section 480 of the New York Civil Practice Act, which provided that interest should be added to recoveries in actions for unliquidated damages caused by breach of contract was under review in *J. P. Preston Co. v. Funkhauser*, 261 N. Y. 140; 290 U. S. 163.

The Court held that the provision for the enlarged remedy was consistent with the substantial rights of the parties under their contract, and could not be regarded as an unreasonable exercise of legislative power.

It is to be noted that in most of the foregoing cases, a contract right was involved—a circumstance absent from the case at bar in which no contract or other rights are involved than those claimed to be vested in appellants by an alleged rule of law which they seek to apply to the provisions of a testamentary trust.

Many other decisions may be cited in which statutes affecting remedies or procedure have been upheld by the Appellate Courts of New York as constitutional, notwithstanding their retroactive operation.

*Matter of City of New York*, 290 N. Y. 236, where the Court of Appeals upheld the constitutionality of Chapter 668 of the Laws of 1941 which provided an additional method to enforce payment of tax liens, to operate retroactively. At page 241 of the opinion, the Court said:

“Stress is laid by the appellant-taxpayer on the retroactive effect of the statute. As to this, we think it sufficient to observe that a new remedy for the collection of taxes may validly be made applicable to taxes theretofore delinquent. (See *League v. Texas*, 184 U. S. 156; *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 601; *Matter of Trustees of N. Y. P. E. Public School*, 31 N. Y. 574, 584, 585; *City of New York v. Appleby*, 219 N. Y. 76.)”

*Brearley School v. Ward*, 201 N. Y. 358, holding that an execution under Section 1931 of the Code of Civil Procedure as amended by Chapter 148 of the Laws of 1908, could lawfully be issued against the income of a trust fund, although the trust was created prior to the passage of said Act, which removed the prior exemption of such income from execution.

*Laird v. Carton*, 196 N. Y. 169, involving Chapter 148 of the Laws of 1908, which extended the scope of an execution which could be issued upon a judgment, to recover wages, earnings or salary of the judgment debtor;

*Matter of Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, making the Arbitration Law, Chapter 275 of the Laws of 1920, applicable to pre-existing contracts;

*Matter of Barker*, 230 N. Y. 364; *Robertson v. Brulatour*, 188 N. Y. 301, and *Matter of Rotter*, 106 Misc. 113, 115, in which cases the validity was challenged of statutes which increased the commissions allowed to trustees on judicial settlements of their accounts and applied the new rates to trusts existing before the enactment of the statute.

Instances may be conjectured, as in the opinion in *Matter of Wacht*, 32 N. Y. Supp. 2d, 871, by which a life beneficiary might conceivably receive, under the rule declared by the statute, more than the share allocable to him out of the proceeds of a salvage operation, according to the Chapal-Otis rule. The situations used as illustrations by the learned Surrogate to establish his point have not yet arisen in practice. Until they do, they furnish no basis for an attack on the constitutionality of this law.

## CONCLUSION

**The decision of the Court of Appeals for the Second Circuit is correct and should be affirmed.**

Respectfully submitted,

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## Appendix

§ 17-c. Real property acquired by foreclosure or conveyance in lieu thereof.

1. Unless otherwise expressly provided in a will, deed of trust or other instrument, in any case in which an executor or a trustee under a will or deed of trust or other instrument shall hold a mortgage upon real property for the benefit of one or more tenants for life or limited term, with remainder over, and such executor or trustee shall acquire title to such real property by foreclosure or conveyance in lieu of foreclosure, such acquired real property shall be and become a principal asset in lieu of such mortgage. Such tenant or tenants for life or limited term shall be entitled to the net income from such acquired real property from the date of its acquisition.

After the date of the taking effect of this section, no allocation or apportionment as between life tenant and remainderman, of the proceeds of the sale of the real property previously subject to a mortgage shall be made. The rules of procedure now or heretofore applicable to such allocations or apportionments of the proceeds of sale are hereby abolished.

The expenses of foreclosure or of conveyance in lieu of foreclosure and the arrears of taxes and other liens which accrued prior to such foreclosure or conveyance shall be charges payable out of principal. Where any moneys have been advanced out of income to pay such expenses, taxes or other liens, they shall be reimbursed to income out of principal.

The terms and rules of procedure of this subdivision shall apply only to the estates of persons dying after its enactment and to trusts created under a deed of trust or other instrument executed after its enactment and to in-

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vestments of mortgages hereafter made by a trustee of an existing trust, whether testamentary or inter vivos.

2. The existing rules of procedure applying to salvage operations respecting existing mortgage investments are continued except as modified by the subparagraphs hereinafter set forth. The terms and rules of procedure of this subdivision shall apply specifically (a) to the estates of persons dying before its enactment and (b) to mortgages on real property held by a trustee under a deed of trust or other instrument executed before the date of its enactment and (c) to real property acquired by foreclosure of mortgage or real property acquired in lieu of foreclosure before or after the date of its enactment in trusts created or mortgage investments made prior thereto, and (d) to any pending proceeding or action for an accounting of the transactions of an executor or trustee.

(a) Net income during the salvage operation up to three per centum per annum upon the principal amount of the mortgage shall be paid to the life tenant, regardless of principal advances for the expenses of foreclosure or of conveyance in lieu of foreclosure and arrears of taxes and other liens which occurred prior to such foreclosure or conveyance and the cost of all capital improvements. Any payment of net income heretofore or hereafter made to the life tenant up to such three per centum per annum shall be final and shall be not subject to recoupment from the life tenant or as a surcharge against the trustee or executor. The amount of all such payments shall be taken into account, however, in the apportionment of the proceeds of sale and shall be charged against the share of the life tenant.

(b) The foregoing principal advances shall be repaid out of excess net income above such three per centum per annum. When principal advances have been satisfied, any

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excess income shall be impounded (subject to reinvestment under the terms of the will or deed) to await sale and apportionment.

(c) The unpaid principal advances shall be a primary lien upon the proceeds of sale and shall be paid first out of any cash so derived. If insufficient the balance shall be a primary lien upon any purchase money mortgage received upon the sale.

(d) The purpose of the enactment of this subdivision is declared to be the simplification of the rules of procedure in mortgage salvage operations and the elimination of present complications which work to the disadvantage of the life tenant, who is usually the principal object of the testator's or settlor's bounty, by depriving him of a fixed right to the actual payment of any net income earned by the property. Such fixed right is granted in lieu of the discretion now given to the trustee to pay net income or any part thereof to the life tenant. The general rules of the apportionment of the proceeds of sale between life tenant and remainderman are retained subject to the express modifications made herein. Only equitable adjustments and balances as between the parties are intended to be effectuated by the provisions of this subdivision. If any provision of this subdivision or the application thereof to any mortgage or acquired property by foreclosure or conveyance, or to any trust is held invalid, the remainder of the subdivision and the application of such provision to any other mortgage or property acquired by foreclosure or conveyance or other trust shall not be affected thereby.

3. The term "mortgage" as used herein shall include a mortgage participation or a mortgage certificate or any other form of interest in a whole mortgage but shall not

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include a mortgage participation or a mortgage certificate or any other form of interest in a group of mortgages.

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Note of Commission.—“This bill is proposed by the executive committee of the Surrogates’ Association of the State of New York. Its general purposes are:

“(1) To simplify the complicated rules restated in *Matter of Chapal* (269 N. Y. 464) and in *Matter of Otis* (276 N. Y. 101) relating to mortgage salvage operations (a) in existing trusts as to mortgages hereafter acquired as a trust investment and (b) in testamentary trusts created by the will of decedent dying after its enactment and (c) in inter vivos trusts created by an instrument executed after its enactment. Such simplification is provided in the first subdivision of the new section.

“It has been the policy of the legislature to simplify the administration of estates of decedents and to save expense to the beneficiaries. In recent years section 17-a of the Personal Property law was enacted to avoid the difficult problems of the allocation of stock dividends received during the period of a trust. Under that section they are now allocated wholly to capital. Section 17-b of the Personal Property law was enacted to abolish the intricate rule in *Matter of Benson* (96 N. Y. 499) under which it was necessary to capitalize the income on monies held within the estate for the payment of administration expenses, debts, taxes and pecuniary legacies. In line with this policy the proposed legislation contained in the first subdivision abolishes, in the instances stated above, the Chapal-Otis rules, and will substitute a simple form of the treatment of the foreclosed real property as a principal asset of the trust. It is to be treated just as a railroad bond upon which default in interest before sale has occurred.

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“(2) Further modifications are proposed by the second subdivision of the section as to mortgage investments already made in existing trusts. The present rules for apportionment between life tenant and remainderman under the Chapal-Otis cases are continued as to existing trusts where the investment in a mortgage has been made, with modification thereof in two specific instances.

“(a) The Chapal-Otis rule authorizes the trustee to pay surplus net income in his discretion. Trustees have hesitated to pay such net income because in the case of overpayment to the life tenant, the trustee might be surcharged with that amount. The life tenant of the trust must wait in the majority of cases for a long period of time before he becomes entitled to the payment of any income, because of the present requirement that advances from principal for the expenses of foreclosure and for arrears of taxes and other liens must first be paid from the net income of the property. The amendment provides for the immediate payment of income to the life tenant beginning with the date of the acquisition of the property by the trustee by foreclosure or conveyance in lieu of foreclosure. Under the new provisions net income up to three per centum of the face amount of the mortgage is so payable. Under the Chapal-Otis rules the life tenant is entitled in the final apportionment to the inclusion of interest at the mortgage rate during the period of the salvage operation. The rate of three per centum in the new section has been recommended as a fair return to the life tenant and at the same time a protection to the remainderman in the event that the property is sold at less than the face amounts of the income and principal shares employed as the ratio of the apportionment. (b) Surplus net income above three per centum is to be applied to the payment of advances from principal until the amount of such advances are satisfied. When the property in the

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salvage operation is sold, the unpaid balance of principal advances must be satisfied first out of the cash received from the sale. If there be any unpaid balance due for principal advances, it is made a primary lien upon the purchase money mortgage. The amendment further directs that after principal advances have been paid, the surplus net income above three per centum, accruing during the salvage operation, shall be held by the trustee to await sale and apportionment under the Chapal-Otis rules."